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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

ROSCOE C. BUCKLES, VERA FAYE BUCKLES, his wife, GEORGE A. BUCKLES, CHESTER R. BUCKLES, and MYRLE BUCKLES, his wife,
Appellants,

vs.

THE PEOPLES GAS LIGHT AND COKE COMPANY, a corporation,
Appellee.

No. 442

MOTION TO DISMISS APPEAL AND BRIEF IN SUPPORT THEREOF

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ROSCOE C. BUCKLES, VERA FAYE BUCKLES, his wife, GEORGE A. BUCKLES, CHESTER R. BUCKLES, and MYRLE BUCKLES, his wife, *Appellants*, vs. THE PEOPLES GAS LIGHT AND COKE COMPANY, a corporation, *Appellee*.	No. 442

MOTION TO DISMISS

Now comes Appellee, The Peoples Gas Light and Coke Company, a corporation, and moves this Court, pursuant to its Rule 16(b), to dismiss the appeal herein on the grounds that:

1. The questions presented by Appellants' Jurisdictional Statement were not timely urged and argued in the court below; and

2. As disclosed by the Jurisdictional Statement, no substantial Federal question is presented for determination by this Court.

QUESTIONS PRESENTED

(1) Whether Appellants have properly preserved the Federal questions they seek to raise in this appeal.

(2) Whether the Federal questions which Appellants seek to raise are sufficiently substantial and sufficiently in doubt to merit the consideration of the United States Supreme Court.

STATEMENT OF THE CASE.

Appellee, The Peoples Gas Light and Coke Company, is an Illinois public utility engaged in the business of distributing and selling gas in the City of Chicago, Illinois. In connection with its gas distribution business, Appellee secured regulatory approval from the Illinois Commerce Commission for the development and operation of an underground gas storage reservoir in the vicinity of Mahomet, Illinois. The Mahomet storage dome, the St. Peter sandstone formation, underlies approximately 23,000 acres at a depth in excess of 1,600 feet, but it was contemplated that in the initial or pilot phase of the project testing and development would be limited to a primary storage area of some 4,390 acres.

Appellants are the owners of a 160-acre grain and livestock farm which lies within the boundaries of the primary storage area. Being unable to agree with Appellants as to the compensation properly payable for the acquisition of an underground gas storage easement, Appellee initiated proceedings in condemnation to secure from

Appellants an easement to store gas in the St. Peter sandstone formation. No rights were sought by Appellee with respect to the surface of the Appellants' farm, nor indeed with respect to any other portion of that farm than the St. Peter formation, a salt water-filled sandstone.

Appellants filed a motion to dismiss the condemnation proceeding, which was overruled by the trial court after the hearing of evidence and filing of briefs by the parties.

Upon the overruling of Appellants' motion to dismiss the condemnation proceeding, the cause was put down for trial before a jury on the sole issue of the compensation or damages properly payable to Appellants by Appellee upon the latter's acquisition of a storage easement on Appellants' property.

At this trial, Appellee presented evidence through three expert real estate appraisal witnesses that the fair cash market value of the 160-acre farm owned by Appellants, at its highest and best use for farming purposes, would be diminished in the amount of $4,000 by virtue of the imposition of Appellee's easement for the underground storage of natural gas.

Appellants attempted to introduce evidence that the highest and best use of their farm was for the purpose of the underground storage of natural gas, and derived a value of the property for this purpose in the order of almost $300,000, with a consequent diminution in value because of the taking of the storage easement. This conclusion was reached on the basis of a purported valuation of the storage easement itself, rather than upon a determination of the price which Appellants' farm would bring on the open market. Appellants' evidence to this effect was rejected by the trial court on the grounds that it was remote and speculative.

At the close of all the evidence proffered by both parties, Appellee's motion for a directed verdict was granted, as the only competent evidence before the court and jury showed the compensation properly payable to Appellants to be $4,000. Judgment was accordingly entered on the verdict. Appellants appealed the judgment directly to the Illinois Supreme Court which, in an opinion reported in 24 Ill. 2d 520, 182 N.E. 2d 169 (set out at Jurisdictional Statement, App. A) affirmed the judgment.

Appellants appeal the decision of the Supreme Court of Illinois affirming the judgment of the trial court, alleging jurisdiction in this Court under 28 U.S.C., Sec. 1257(2), on the grounds that the Illinois Underground Gas Storage Act (Ill. Rev. Stat. 1961, chap. 104, Sec. 104-112; set out at Jurisdictional Statement, App. B) is contrary to the Fourteenth Amendment to the Constitution of the United States.

Appellee contends, however, that the issues urged upon the United States Supreme Court in Appellants' Jurisdictional Statement were not raised before nor decided by the Illinois Supreme Court, nor necessary to its decision, and that they are not properly before this Court. Alternatively, Appellee contends that even if these questions are before this Court, their answer is so clear that the appeal should be dismissed for want of a substantial Federal question.

ARGUMENT.

I.

THE APPEAL SHOULD BE DISMISSED BECAUSE NONE OF THE SO-CALLED "FEDERAL QUESTIONS" URGED IN THE JURISDICTIONAL STATEMENT WERE PROPERLY RAISED IN THE STATE COURT FROM WHICH THIS APPEAL IS BROUGHT.

The case at bar comes to this Court after the resolution of a variety of issues by the courts below. The fairest summary of these issues, indicative of the context in which they were resolved by the Illinois Supreme Court is set forth in that Court's Opinion at p. 16 of the Jurisdictional Statement:

> "The defendants, appellants in this court, raise numerous grounds for reversing the judgment of the trial court. Basically, these fall into four principal categories. First, the matter of 'jurisdictional proof' (as defendants characterize it) as a prerequisite for the taking of defendants' land. This involves the validity of the order of the Commerce Commission and an asserted lack of certain other 'jurisdictional requirements.' Second, the constitutionality of the Gas Storage Act of 1951. (Ill. Rev. Stat. 1959, chap. 104, pars. 104 *et seq.*) Third, errors of the trial court relating to rulings on continuances, discovery and the pleadings which defendants contend denied them due process of law. Fourth, the exclusion of all evidence of value offered by the defendants with the withdrawal of the case from the jury and the direction of a verdict."

To invoke the jurisdiction of this Court, there must have been involved in the Illinois Supreme Court's ruling on

these issues a Federal question which was properly urged on that Court, and properly preserved on the appeal to this Court. *New York ex rel. Cohn v. Graves*, 300 U.S. 308, 317 (1937); *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434-35 (1940).

Appellants' Jurisdictional Statement discloses that the *only* Federal question relied on is a denial of due process under the Fourteenth Amendment in the application of the Illinois Storage Act to Appellants because of the trial court's refusal to admit evidence offered by them as to the value of their farmland for underground gas storage purposes. The jurisdiction of this Court, then, depends upon finding from the present record that the contention that these exclusionary rulings was violative of due process to Appellants under the Fourteenth Amendment was properly raised and was in fact determined by the Illinois Supreme Court.

Appellants first seek to find an indication in the record that they urged, and that the Illinois Court decided adversely to them, that the rulings by the trial court on the evidentiary matters before it amounted to an unconstitutional denial of Federal due process by quoting, at p. 5 of the Jurisdictional Statement, one of the Points and Authorities upon which this case was presented to the Illinois Supreme Court. Appellants, however, neglect to include in their quotation of this Point material which is conclusively instructive on the *actual issue* that Appellants were arguing at that point in this proceeding:

> "The arbitrary action of the trial court *in its rulings on pre-trial questions including the use by Respondents of discovery procedures, in its rulings excusing important material witnesses from testifying, and in denying motions for the continuance supported by affidavit without regard to Supreme Court Rule 14,*

> *and* by impressing its theory as to just compensation on the respondents by its trial rulings, was in violation of due process." (Point IV, p. 14, Appellant's brief to the Illinois Supreme Court; material omitted in Appellants' quotation supplied and emphasized)

It is clear from the full quotation of the Appellant's phrasing of the issue that in the Illinois Supreme Court they were *not* arguing that an unconstitutional measure of damages was authorized or required by the Storage Act to be applied to them. Rather, Appellants' argument was that the pattern of the trial court's *entire conduct of the case*, as evidenced by its rulings on the various matters from start to finish, evinced such a disregard for their rights as to constitute bias and prejudice which amounted to a judicial denial of due process through the denial to Appellants of a fair and impartial trial.

Not only is it clear that this is the issue that was *raised* by Appellants, it is equally clear that this is the issue that was *decided* by the Illinois Supreme Court:

> "The next category of defendants' objections deals with the denial of due process in violation of constitutional rights because of the rulings of the trial court upon pre-trial matters. While defendants list some 17 supposed 'arbitrary actions' by the trial court which 'constitute the denial of due process' they fail, in most cases, to point out wherein the ruling was erroneous other than being adverse to them. Rulings on continuances and most of the matters contained in defendants' 'specifications' were discretionary with the trial court and no abuse of discretion is shown. Furthermore, the request of the defendants and the rulings of the trial court in many of the complained-of instances relate to the theory of damages sought by the defendants and which we discuss later. As to the constitutional point of denial of due process, however, we have held that neither an abuse of discretion nor an erroneous rule of law as to damages or the refusal

> to admit evidence or grant continuances will support a reversal for violation of due process. [Citing] Moreover, procedural due process is not a guarantee against erroneous or unjust decisions nor protection against the incorrect construction of statutes or rules of law. (Jurisdictional Statement, p. 19-20)

Obviously, the Illinois Court did not have before it the question of whether or not the Storage Act authorized an unconstitutional exclusion of evidence, but was considering only whether or not the trial judge's conduct had been so arbitrary and prejudicial as to amount to a denial of due process. An appeal to this Court under 28 U.S.C. 1257(2) is authorized only where the validity of a state *statute*, not the conduct of a trial by a state judge, has been "drawn in question." Simply stated, the fatal defect in Appellants' position is that *they failed to preserve the point which they argued, and failed to argue the point which they preserved.* Under these circumstances, neither point is properly before this court.

Appellants' only other assertion of a Federal question is found in their suggestion that they raised the issue that the evidentiary rulings of the trial court at the hearing on damages were unconstitutional in their Petition for Rehearing filed *after* the opinion of the Illinois Supreme Court. (Jurisdictional Statement 5, 6). Apparently, Appellants at this point awakened to the realization that although they had raised several constitutional arguments against the Storage Act (which they are now content to waive), *they had never urged or argued that the Storage Act authorized or contemplated an unconstitutional measure of damages*, since this case was tried on the understanding expressed by the Illinois Supreme Court that the measure of damages to be applied in the case was the normal and customary one in condemnation cases. As stated by the Illinois Supreme Court:

> "Plaintiff's taking amounts to no more than an easement, and the usual measure of damages payable to such cases is based upon the diminution of the fair cash market value of the property burdened by the easement. [Citations]" Jurisdictional Statement, p. 22.

From the outset of this case Appellants were well aware that the procedures covering the condemnations authorized by the Storage Act would be, as provided by Sec. 104 of the Storage Act (Jurisdictional Statement, p. 32), "in the manner provided for by the law of eminent domain." Illinois procedures in eminent domain are established by Ill. Rev. Stat. 1961, Chap. 47, Sec. 1, *et seq.*, the constitutionality of which has never been seriously questioned. Actually, if Appellants were to follow the logic of their argument in objecting to the rulings of the trial court, they should be attacking the constitutionality of the Illinois Eminent Domain Act. Significantly, they did not do this, and they are forced to argue that the objections which they made to the Storage Act included the issue which they now urge upon this Court, when in fact those objections did not. Though they purport to be attacking the constitutionality of the Storage Act, it is interesting that nowhere in Appellants' Jurisdictional Statement do they point out to this Court the provision or language of that Act which Appellants contend is unconstitutional.

In essence therefore, what Appellants now seek to do is convert an argument based upon evidentiary rulings allegedly erroneous under state law into an argument that the Storage Act imposes a new and unconstitutional measure of damages in condemnation cases brought pursuant to it. Jurisdictionally, their effort comes too late to afford them the remedy of review in this Court, as it is contrary to the long-established rule that a Federal question first raised in a petition for rehearing cannot serve as a basis of an ap-

peal to the United States Supreme Court. *Chicago, Ind. & Louisville Railway* v. *McGuire*, 196 U.S. 128 (1905); *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128 (1945); *American Surety Co.* v. *Baldwin*, 287 U.S. 156 (1932) (*certiorari* to Idaho Sup. Ct.).

In their Jurisdictional Statement, Appellants anticipate the rule that they cannot rely on Federal questions raised for the first time in a petition for rehearing to the state court by attempting to take advantage of the so-called "surprise" doctrine, that a Federal question is properly raised if made at the first opportunity, even though that opportunity be in a Petition for Rehearing.

Thus, they state that the Illinois Supreme Court "held that whatever may have been the rights of the appellants in this strata, they were effectively removed when a certificate to use the strata for gas storage was issued to the appellee by the Commission." (Jurisdictional Statement, p. 7-8), and that the "rule of law" so laid down came as a complete and unanticipated surprise to Appellants because "there was no intimation in prior Illinois decisions that the issuance of a certificate foreclosed the landowner from valuing the property for the purpose taken." (Jurisdictional Statement, p. 9).

To take advantage of the surprise rule, the Appellants *must in fact have been surprised;* that they were not is indicated by their argument at p. 3 of their Reply Brief submitted to the Illinois Supreme Court:

> "Petitioner says the Defendants do not have a certificate of public convenience and necessity, and, therefore, it is not possible for them to utilize this land for gas storage."

But though this point was raised by Appellants in their Reply Brief and precludes them from taking

advantage of the *surprise* rule, it does *not* afford them an opportunity to have that question considered by this Court, for at no point, *prior* to the Petition for Rehearing, did Appellants ever argue or urge that the application of such a rule would violate any provision of the *United States* Constitution.

It is well-established that a general reference to "due process" will be taken to have reference to the state constitution clause concerning that subject. *Gibbes* v. *Zimmerman*, 290 U.S. 326 (1933); *Bowe* v. *Scott*, 233 U.S. 658, 664-65 (1914).

Illinois, like most states, has a "due process" clause,* and under the rule of the foregoing cases, Appellants' averments, and their resolution by the Illinois Supreme Court must be taken to have had reference solely to arguments raised under the state constitution. The Federal issue was thus not properly raised, and the Illinois Supreme Court's decision, if any, on the state constitution presents no issues for determination by *this* Court.

But even assuming that the rule of law alleged by Appellants to have been laid down by the Illinois Supreme Court could be said to come as a *surprise* to them, it is clear *that in fact no such rule was enunciated by the Illinois Supreme Court.* The Illinois Supreme Court viewed the fact that a certificate of public convenience and necessity would be required by Illinois law prior to the operation of an underground gas storage project as simply another fact supporting the conclusion that it was extremely unlikely that a potential purchaser of Appellants' property would, in appraising its value, attach any significance to the fact that it was underlain by a salt water-

* (Art. II, Sec. 2, Ill. Constitution of 1870).

filled strata that might possibly be suitable for gas storage:

> "The marketability of defendants' land for a gas storage reservoir rests not only on a combination of other parcels but also on the grant of a certificate of public convenience and necessity, which makes any potential value from such use too remote and speculative for consideration in a condemnation proceeding." (at p. 29 of Jurisdictional Statement)

But even if the Illinois Supreme Court had ruled that the issuance of a certificate for a storage project deprived Appellants of the right to show that the property's value for storage purposes had been reflected in the cash market price which a purchaser would have been willing to pay for the property, it would avail Appellants nothing here: for the Supreme Court's affirmance of the trial court's decision rests on an adequate and independent state ground justifying the rejection of the evidence offered by Appellants in the trial court, which preclude Appellants from relying on a "Federal question" which was not necessary for the decision of the case. *Stembridge* v. *Georgia*, 343 U.S. 541, 547-48 (1952); *Herb* v. *Pitcairn*, 324 U.S. 117, 125-26 (1945).

The first such ground is the rule of law that value for a purpose requiring the combination of a great number of parcels of land cannot be reflected in the cash market value of a particular parcel, unless the possibility that such combination can be effected is not remote and speculative. (See cases discussed in the lower Court's opinion at pp. 24-28, Jurisdictional Statement, and relied on for the statement that "Neither is there a 'reasonable possibility' that the defendants could use their land together with the other lands necessary for a gas-storage field." (Jurisdictional Statement, p. 28). An additional independent state

ground supporting the Illinois Supreme Court's decision is its reliance on what it referred to as the "well established rule in determining values, *i.e.*, that no consideration is to be given to the value to the condemnor for some special use." (Jurisdictional Statement, p. 29)

The whole problem with Appellants' theory is that they are attempting to manufacture a constitutional issue out of a factual comment made by the Illinois Supreme Court in the course of holding "that defendants' theory of value for their property was remote and speculative and the trial court was correct in rejecting the defendants' offer of proof." (Jurisdictional Statement, p. 30)

II.

EVEN IF THE ISSUES RAISED BY APPELLANTS WERE PROPERLY BEFORE THIS COURT, THOSE ISSUES HAVE LONG SINCE BEEN RESOLVED AGAINST THEM AND PRESENT NO SUBSTANTIAL FEDERAL QUESTION FOR DECISION BY THIS COURT.

The nature of the issue involved in this case and the Illinois rule of law applied in its resolution are well stated in Justice Solfisburg's opinion:

> "To understand the problem we must initially determine the nature of the taking. Plaintiff's petition sought, and the judgment of the court gave the plaintiff the right, privilege and easement to introduce gas into the St. Peter geological strata and to store gas in such formation with the right to remove such gas with any water vapors absorbed. *No taking of the fee or damages to the surface of the land is involved.* Plaintiff's taking amounts to no more than an easement, and the usual measure of damages payable to such cases is based upon *the diminution of the fair*

> *cash market value of the property burdened by* the easement. [Citing]" (emphasis added; Jurisdictional Statement, p. 22).

The Illinois courts held that no evidence of value based on the adaptability of Appellants' land for gas storage would be allowed. This holding was based on a number of considerations, but mainly on the fact that Appellants own only 160 acres out of the many thousand necessary to the project. Just as the United States Supreme Court has held in a series of cases involving condemnation of reservoirs,* the Illinois Supreme Court held here that the likelihood of Appellants being able to join all the tracts necessary without the power of eminent domain was so slight as not to be considered. Accordingly, the Supreme Court of Illinois was simply affirming the trial court's finding that the fair cash market value of Appellants' property, as that value would be judged by a potential purchaser thereof, would not include any increment by reason of the potential use of a geological formation under the property for underground gas storage purposes.

The only argument that Appellants now make is that the compensation which they were given was inadequate. "Compensation for the damage due to the loss in value of the surface is not compensation, just or otherwise, for the underground gas storage area taken." (Jurisdictional Statement, p. 11). The Illinois Supreme Court, as shown above, specifically held that the compensation paid was not paid for damage to the surface, for no damage to the surface was expected. The award of compensation was for the difference between the market value of the whole

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* *McGovern v. New York*, 229 U.S. 363 (1913); *City of New York v. Sage*, 239 U.S. 57 (1915); *Olson v. United States*, 292 U.S. 246 (1934); *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943).

fee simple and the market value of the fee burdened by the storage easement. Compensation was paid for exactly what was taken, under the rule long established by the Illinois Courts.

Mr. Justice Holmes, in *McGovern* v. *New York*, 229 U.S. 363 (1913), answered a contention identical to that made here. The defendant in a condemnation proceeding claimed that his property had been taken without due process of law. The statute in question provided that "just and equitable compensation . . . ought to be made." The trial court had refused to admit any evidence of the value of the land for reservoir purposes because so many parcels were involved that the possibility of consolidation was negligible. Justice Holmes observed that "If there has been any wrong done it is due not to the statute but to the courts having made a mistake as to evidence, or at most as to the measure of damages. But of course not every judgment by which a man gets less than he ought and in that sense is deprived of his property can come to this court." (at 370). See also *Roberts* v. *New York*, 295 U.S. 264, 277 (1935).

The Appellants here relied on *Chicago, Burlington & Quincy* v. *Chicago*, 166 U.S. 226 (1897) but they have not shown that their case comes within the rules laid down there for review by the Supreme Court. In fact, the *Chicago, Burlington* case itself lays down standards for review of an issue such as that raised by Appellants that are pursuasive to the conclusion that this appeal presents no substantial Federal question. After a jury trial, a verdict awarding damages to the railroad in the amount of one dollar was entered, and the Illinois Supreme Court affirmed this award. The railroad appealed to the United States Supreme Court contending "That the judgment of the state court whereby a public street is opened across its land used for railroad purposes, and whereby compensa-

tion to the extent of one dollar only is awarded, deprives it of its property without due process of law contrary to the prohibitions of the Fourteenth Amendment;" at p. 232. After holding that the point had been properly preserved by the Appellant railroad the U. S. Supreme Court, through Mr. Justice Harlan, proceeded to consider the merits of the railroad company's contentions.

> "The contention of the railroad company is that the verdict and judgment for one dollar as the amount to be paid to it was, in effect, an appropriation of its property rights without any compensation whatever; that the judgment should be read as if in form as well as in fact it made no provision whatever for compensation for the property so appropriated." At p. 241.*

This Court appraised the railroad company's contentions in the light of the following standards:

> "In harmony with those views, we may say in the present case, that the state court having jurisdiction of the subject-matter and of the parties, and being under a duty to guard and protect the constitutional right here asserted, the final judgment ought not to be held to be in violation of the due process of law enjoined by the Fourteenth Amendment, unless by its rulings upon questions of law the company was prevented from obtaining substantially any compensation. See also *Marchant* v. *Pennsylvania RR*, 153 U.S. 380." At p. 247.

This court affirmed.

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* Appellants' suggestion that their case derives some strength from the fact that they were denied a jury trial by the verdict which was directed against them (Jurisdictional Statement, p. 11) is also overthrown by the *Chicago, Burlington* case, as the Court at p. 244 notes that there is no right under the Federal Constitution to a jury trial in a condemnation case brought pursuant to state law. In any case, even where there *is* a right to jury trial, it is proper to direct a verdict where all of the evidence is in agreement, and there is no suggestion by Appellants that there was any evidence before the trial court contradictory of that introduced by Appellee.

Again, the *Chicago, Burlington* case is dispositive of another point urged by Appellants. The holding that evidence of the value of Appellants' farm for gas storage purposes was too remote and speculative to be considered, compares with the argument of the railroad that it was possible that at some time it might cease to use its property for a railroad right of way, and that it should therefore be permitted to prove its damages as if the street were being constructed across property available for sale in the general real estate market. In answer to this contention, Mr. Justice Harlan said, at pp. 249-250:

> . . . the jury could not properly have taken into consideration the possibility that at some future time the company would adopt that course, and thereby put itself in condition, if no street were opened across it, to sell its land for what it was worth as land, freed from any public easement. Such a possibility was too remote and contingent to have been taken into account. There was nothing in the evidence, introduced or offered and excluded, suggesting any probability that the company intended to use or would in the near future use the land within the crossing for any other purpose than as a right of way."

In the case at bar, there was no suggestion that the Buckles farm was to be used for anything but farming by its owners or, more important, by a potential purchaser of the property. Accordingly its value reflected only its highest and best use for farming purposes, and the trial court properly refused to attribute to the Appellants' property any "value" derived from a use to which no potential purchaser would put it.

This Court has often held that remote and speculative evidence of value may properly be excluded, and it does not sit to review state court determina-

tions of whether such evidence *was* speculative. As this Court said in *McCoy* v. *Union Elevated R.*, 247 U.S. 354, 363 (1918), "Our concern is not to ascertain whether the rule [of condemnation] adopted by the State is the one best supported by reason or authority nor with mere errors in course of trial but with denial of a fundmental right."

CONCLUSION.

For the reasons stated, Appellee considers the appeal of this case improvidently filed and urges this Court to dismiss the appeal for failure to properly raise the Federal questions argued, or, alternatively, for want of a substantial Federal question.

Respectfully submitted,

By .....

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